(8)

No. 01-298

IN THE

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR CERES MARINE TERMINALS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR CERES MARINE TERMINALS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS CURIAE*

Ceres Marine Terminals, Inc., is a marine terminal operator with operations in several States. It is in the midst of a long-running administrative proceeding before the Federal Maritime Administration ("FMC") against the Maryland Port Administration ("MPA"), in which the issue of Eleventh Amendment immunity was first raised after five years of litigation on the merits. That litigation included extensive discovery; a hearing before and decision by an administrative law judge; a decision by the FMC on the merits in favor of

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amicus curiae* or its counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

Ceres; an MPA petition for review before the United States Court of Appeals for the Fourth Circuit; a decision by the Fourth Circuit on the merits affirming in part, reversing in part, and remanding for further proceedings; and, thereafter, further briefing before the FMC on the merits.[2]

In the briefing before the FMC on the issue of Eleventh Amendment immunity, MPA took the position, among other things, that its conduct in litigating the merits before the FMC and the Fourth Circuit did not waive MPA's immunity because neither the State Attorney General nor MPA itself was authorized by State law to waive that immunity in a federal forum. The FMC stayed further consideration of the issue pending this Court's disposition of *South Carolina State Ports Authority* v. *Federal Maritime Commission*, 243 F.3d 165 (4th Cir. 2001), *cert. granted*, No. 01-46.

In the light of these proceedings, Ceres has a strong interest in certain issues presented by this case, such as (1) under what circumstances the invocation of federal court jurisdiction waives the Eleventh Amendment immunity of a State entity and (2) whether litigation conduct by a State-entity defendant can constitute a waiver or forfeiture of Eleventh Amendment immunity if the State's attorney is not specifically authorized by the State law to waive immunity, even though the attorney is authorized to conduct litigation by and against the State and its entities.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case before the Court presents the question whether a State entity may prevail on a defense of sovereign immunity

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[2] See *Ceres Marine Terminals, Inc.* v. *Md. Port Admin.*, 27 Shipping Reg. Rep. (P & F) 1251 (FMC 1997); *Md. Port Admin.* v. *FMC*, 164 F.3d 624 (table), 1998 U.S. App. LEXIS 25733, 28 Shipping Reg. Rep. 545 (4th Cir. 1998); *Ceres Marine Terminals, Inc.* v. *Md. Port Admin.*, Dkt. No. 94-01, 2001 WL 1085428 (FMC Aug. 15, 2001).

after certain conduct in litigation—in particular, the State-entity's removal of the case, originally filed in State court, to federal court. Under 28 U.S.C. § 1441, removal requires the consent of the State defendant. The Board of Regents, accordingly, voluntarily invoked the jurisdiction of the federal court and did so by specific action taken by its counsel in the course of the litigation.

There are many contexts in which private parties in federal court take the position that a State entity has waived or forfeited the defense of sovereign immunity by affirmative conduct in federal court litigation. In some cases, the State entity has taken steps that overtly invoke the jurisdiction of the federal court—such as removal (as here), initiating a proceeding a federal court, intervening in a case already in federal court, or filing a proof of claim in bankruptcy—and the waiver-of-immunity issue arises later in the proceeding with respect to a related issue, claim, or counterclaim. In others, a State entity that has been sued in federal court affirmatively seeks a ruling on the merits—such as by moving for summary judgment on the merits, going to trial on the merits, or appealing on the merits—without presenting a defense of sovereign immunity until late in the proceeding. In all these types of cases, whenever the issue of sovereign immunity is raised, the State entities regularly make two arguments in an effort to forestall a ruling that they have waived or forfeited immunity: first, that the litigation conduct does not waive or forfeit immunity because the State Attorney General or other counsel whose conduct is at issue is not authorized by State law to waive immunity, under the perceived rule of *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), and, second, that the State entity is entitled to raise the issue late in the proceeding because a State entity may raise Eleventh Amendment immunity at any time in the course of the proceedings, under another perceived rule of *Ford* echoed in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and in some other cases.

The Court should take this opportunity to make clear that neither of these arguments is valid.

First, the authority of the State Attorney General or other attorney to waive immunity under State law should be irrelevant to the assessment of the consequences of affirmative conduct in federal court litigation. Recognizing such a federal rule would bring the rule applicable to State-entities that are defendants in federal court in line with the rule applicable to State entities that intervene or file proofs of claim in ongoing federal court cases. *Clark* v. *Barnard*, 108 U.S. 436 (1883); *New York* v. *Irving Trust* Co., 288 U.S. 329 (1933); *Missouri* v. *Fiske*, 290 U.S. 18 (1933); *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). Such a rule shows no disrespect to the States. State-entities often have good reason, when sued, to seek a ruling on the merits rather than to raise immunity. Permitting State entities to manipulate federal courts' Article III jurisdiction by strategic repudiation of their attorney's conduct in litigating on the merits subjects federal courts to expensive, time-consuming proceedings that may be turn out to be wasted and puts them in the position of issuing potentially advisory opinions, contrary to the fundamental principles of Article III. While Congress acting under Article I cannot abrogate a State's sovereign immunity from suit, federal courts may properly insist that State entities assert immunity before litigating on the merits and may bar State entities from later asserting that the State Attorney General lacked authority to bind the State entity to the consequences of its actions.

If applying the correct rule requires the overruling of the relevant part of *Ford*, that step should be taken. In his concurrence in *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998), Justice Kennedy urged reconsideration of the perceived *Ford* rule that immunity may be raised at any time in a proceeding. Specifically, he urged the Court to consider ruling either that it is proper to "infer[] waiver from the failure to raise the [Eleventh Amendment]

objection at the outset of the proceedings," or that a State entity waives immunity when, "under no compulsion," it "voluntarily invokes [federal court] jurisdiction," such as by removing a case to federal court. 524 U.S. at 395. The first step in following that suggestion is to divorce the issue of waiver-by-litigation-conduct from the issue of the authority of the State's attorney under State law.

The second step in following Justice Kennedy's suggestion would be to repudiate those parts of *Ford* and of *Edelman* v. *Jordan* that permit the defense to be raised at any time in the proceedings or "for the first time on appeal." That part of *Ford* never fit well with the long-standing rule that sovereign immunity could be waived and has since been undermined by this Court's recognition that sovereign immunity does not partake enough of subject-matter jurisdiction that courts must address the issue *sua sponte* even if the State entity has not raised it. *E.g.*, *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 515–16 n.19 (1982); *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. at 389.

The Court should also take the opportunity to make clear that it is irrelevant whether the State entity itself (as distinguished from the State Attorney General) is authorized to waive immunity as a matter of State law. Once again, there is no difference between a State entity invoking federal jurisdiction by intervening or filing a proof of claim—circumstances in which this Court has not inquired into the authority of the State entity to waive immunity—and a State entity litigating on the merits as a defendant rather than raising an available immunity defense.

Finally, the Court should rule that a State entity invoking federal court jurisdiction over a matter waives any Eleventh Amendment immunity against suit in federal court. We leave to Petitioner the argument that removing a case to federal court by itself waives that immunity. Whether or not the Court accepts Petitioner's argument, it should do nothing to

undermine Justice Kennedy's suggested rule that a State-entity defendant that does not raise its immunity defense before litigating on the merits forfeits immunity. As Justice Kennedy suggested, Eleventh Amendment immunity more closely resembles personal jurisdiction than subject-matter jurisdiction. Accordingly, a State entity lacks the right to dismissal on the basis of immunity if it has litigated on the merits without raising the defense.

ARGUMENT

I. In Determining Whether a State Entity Has Waived or Forfeited Sovereign Immunity by Conduct in Litigation, a Court Should Not Look to the Authority To Waive Immunity That State Law Confers upon the State's Attorney.

A. In this case, the Eleventh Circuit ruled that removal of the case to federal court did not waive immunity in large part because the State Attorney General lacked authority under State law to waive immunity. 251 F.3d 1372, 1374–75, 1376 (11th Cir. 2001), Pet. App. 6a, 8a.

This part of the Eleventh Circuit decision should be rejected. It only sows confusion to focus on the action of the attorney for the State entity in considering whether affirmative conduct in litigation in a federal court has waived sovereign immunity. The action is against the State entity. All actions in the litigation are taken in the name of the defendant State entity. While the State entity must necessarily act in Court through its attorneys, its conduct in litigating a federal court case is its own conduct.

Instead, the federal rule should recognize that a State may not litigate a case on the merits and then, dissatisfied with the course of proceedings, invoke sovereign immunity by asserting lack of authority to waive immunity on the part of its attorneys.

That rule would bring the rule applicable to State-entity defendants in line with the rule applicable to State entities that invoke the jurisdiction of a federal court as a claimant or intervenor. This Court has not inquired into the State law authority of the State Attorney General to waive immunity when the State has intervened in ongoing proceedings—as in *Clark* v. *Barnard*, 108 U.S. 436 (1883), and *Missouri* v. *Fiske*, 290 U.S. 18 (1933)—or filed proofs of claim in bankruptcy proceedings—as in *New York* v. *Irving Trust* Co., 288 U.S. 329 (1933), and *Gardner* v. *New Jersey*, 329 U.S. 565 (1947). A State defendant that litigates on the merits instead of promptly presenting a defense of sovereign immunity is in the same position. It is voluntarily seeking a judgment on the merits, because it has the opportunity to seek dismissal on the ground of immunity and thus to avoid any ruling on the merits. The federal rule should recognize that there is no material difference between seeking a ruling on the merits by litigating the merits without raising immunity and seeking a ruling on the merits by intervening or filing a claim in federal court.

Such a federal rule shows no disrespect to the State. State entities, in consultation with their attorneys, will often have good reason to seek a merits ruling rather than invoking Eleventh Amendment immunity. The State entity may realize that substantial prosecutorial, regulatory, or litigation resources may be wasted, or confusion and uncertainty may persist, if an important legal issue is not promptly resolved. Or a State may want to obtain a prompt merits ruling in its favor in order to further its policy or commercial interests.[3] Any of these

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[3] With the demise of the constructive waiver theory of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), see *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), State entities will have many more opportunities than before to consider whether their commercial interests in a ruling on the merits outweigh the benefits of a dismissal on immunity grounds.

concerns may prompt a State entity to elect to defend a lawsuit presenting an important issue on the merits, rather than moving to dismiss because of sovereign immunity. A classic example is *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496 (1982), where the State entity sought a ruling on whether exhaustion of State administrative remedies was a prerequisite to an action under 42 U.S.C. § 1983, rather than pressing for dismissal on immunity, and urged the Court to rule on the § 1983 issue even after the Court raised the immunity issue *sua sponte* at oral argument. See 457 U.S. at 515–16 n.19.[4] It shows disrespect, not respect, to distrust the State's ability to control its own attorneys and ensure that such strategic decisions are made on the basis of adequate consideration of the risks and benefits of litigation on the merits.

Moreover, this federal rule is necessary to protect the fundamental tenet of Article III that federal courts not issue advisory opinions. In a thorough opinion ruling that there is no sovereign immunity exception to claim preclusion, the Seventh Circuit pointed out that permitting a sovereign to "ignore [a prior adverse] judgment and insist that its adversary try again" is "not compatible with the Constitution, for Article III courts exercise the 'judicial Power of the United States'—which is to say, a power to enter judgments that are conclusive between the parties." *United States* v. *County of Cook, Illinois*, 167 F.3d 381, 386 (7th Cir. 1999) (Easterbrook, J.), relying, *inter alia*, on *Gunter* v. *Atlantic Coast Line Railroad*, 200 U.S. 273 (1906) (which precluded a second lawsuit by a State). Nor is it compatible with Article III to permit a sovereign to litigate on the merits and then—dissatisfied with the results—to repudiate

[4] For a more recent example, see *Montgomery* v. *Maryland*, 266 F.3d 334 (4th Cir. 2001), where the State first moved for dismissal on immunity grounds and then expressly withdrew the motion. The court of appeals ruled (in part) that respect for State sovereignty "is undermined when a federal court imposes on a state a legal argument that the state first advanced but then affirmatively withdrew." 266 F.3d at 337.

the actions of its attorney before final judgment or before disposition on appeal. In both cases, the federal judiciary would be put to the time and expense of processing a case through discovery, through preliminary rulings, and, in some cases, through trial and even appeal, only to see its judgments and opinions negated by the State entity changing its litigation strategy and invoking immunity in court. Federal courts should not permit the State to repudiate the actions of its attorneys in litigating on the merits at any time it pleases before final judgment or disposition on appeal, when it cannot do so on collateral attack after the judgment becomes final.

This suggested federal rule does not trespass on the rule of *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), that Congress cannot abrogate immunity under Article I, because the Court would simply be specifying the proper time and manner to present an immunity defense in federal courts, in the exercise of its Article III powers. Moreover, the Court has applied a federal rule to Eleventh Amendment issues in other contexts. The Court has stated, for example, that whether an entity is an "arm of the State" for sovereign immunity purposes is a question of federal law, not State law. *E.g.*, *Regents of the University of California* v. *Doe*, 519 U.S. 425, 429 n.5 (1997). Under the federal rule we propose, a State or State entity remains entirely free to assert sovereign immunity as a bar to every case in which it is sued. The federal rule does no more than tell the State that it must decide whether to invoke immunity actively before litigating on the merits.

To the extent that *Ford Motor Co., Inc.* v. *Department of the Treasury*, 323 U.S. 459 (1945), stands as an obstacle to the correct rule, it should be overruled. Justice Kennedy's concurrence in *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998), urged reconsideration of the rules in this area of law, pointing out the unfairness of permitting a State entity to litigate on the merits as a defendant and then to raise immunity. Justice Kennedy urged that the rule

for immunity be made "more consistent with our practice regarding personal jurisdiction." 524 U.S. at 395.[5]

Reconsideration of the *Ford* rule is ripe for several reasons in addition to its manifest unfairness and conflict with Article III. *Ford* gave no adequate explanation why the conduct of the Indiana Department of the Treasury in that case—litigating on the merits through the court of appeals and raising immunity only in this Court—would constitute a waiver of immunity only if the State Attorney General were authorized under Indiana law to waive immunity. Indeed, it did not cite *Clark* v. *Barnard*, *Missouri* v. *Fiske*, or *New York* v. *Irving Trust Co.*—earlier cases involving waiver by litigation conduct (intervening or filing proofs of claim) where the Court had not looked for the attorney's authority under State law to waive immunity. The failure of explanation in *Ford* is all the more puzzling because this aspect of *Ford* was directly contrary to the Court's ruling in *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916), where the Court, without inquiring into authority to waive immunity, unanimously ruled that the Treasurer of Puerto Rico, in a suit to recover taxes paid, could not raise Puerto Rico's immunity to suit in federal court when the argument had not been "promptly asserted and adhered to" and the Treasurer, "appearing by its Attorney General," had "solemnly appeared" and answered both the original and an amended complaint. 241 U.S. at 47. While the Court in *Ford* distinguished *Richardson* on the ground that the Court had not "consider[ed] any limitation on [the Attorney General's] powers," 323 U.S. at 469 n.14, it failed to address the fact that *Richardson* had relied on "the principles" of an earlier case, *Porto Rico* v. *Ramos*, 232 U.S. 627 (1914), in which the Court had found waiver in Puerto Rico's voluntary intervention in a

[5] *Ford* also held—or, more accurately, reiterated—that a suit against State officers for money from the State treasury is a suit against the State for Eleventh Amendment purposes. That oft-cited part of *Ford*, see, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974), would still stand.

case in which it had not been sued—a kind of litigation conduct that has never caused this Court to inquire into attorney-authority to waive immunity. 241 U.S. at 47. The Court in *Richardson* manifestly found that defending on the merits without raising immunity is analogous to intervening on the merits, as it is.[6]

Nor has this Court often followed this part of *Ford*. The only case we are aware of in which the Court again addressed the authority of a State Attorney General on the issue of waiver is *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975), where the Court *sua sponte* addressed the authority of the Iowa Attorney General to waive immunity and found such authority under Iowa law.

B. Besides ruling that attorney authority under State law to waive immunity is irrelevant to deciding when State-entity conduct in litigation waives immunity, this Court should also repudiate the perceived *Ford* rule that a State may raise an immunity defense at any stage of the proceedings.

It may not be necessary to take this additional step. Immediately after the Court in *Ford* stated that it would consider the immunity defense "even though urged for the first time in this Court," 323 U.S. at 467, the Court proceeded to address whether the State Attorney General's litigation conduct

[6] *Porto Rico* v. *Ramos* and *Richardson* were cited with approval by the Court in *United States* v. *Norwegian Barque "Thekla"*, 266 U.S. 328 (1924) (Holmes, J.), where the Court unanimously applied the principles of those cases to hold that the United States waived sovereign immunity to a judgment on a cross libel when it intervened in an admiralty case and sought a judgment on the merits. Not every intervention necessarily "invokes federal jurisdiction" so as to waive immunity. Intervention may take many different forms—from limited intervention for a specific, non-merits purpose, as in *Missouri* v. *Fiske*, to full intervention as a party.

waived immunity.[7] Doing so made sense only if waiver was a different question from ability to raise the defense. Thus, the Court could adhere to the rule that the defense of sovereign immunity may be "raised" at any stage in the proceeding, while making clear that the defense, though validly raised, may be legally insufficient where State-entity defendants have permitted their attorneys to litigate a federal case on the merits, even though their attorneys may not have possessed authority under State law to waive immunity.[8]

It would be preferable and more consistent with recent authority, however, for the Court to repudiate the *Ford* rule that immunity may be raised at any stage in a proceeding (including for the first time on appeal). This perceived rule confusingly suggests to lower courts that a State may raise immunity late in the proceedings or for the first time on appeal even after the State's attorneys have litigated a case on the merits without raising immunity as a defense.

Like the attorney-authority aspect of *Ford*, this perceived rule that immunity can be raised at any time in a proceeding has rarely been followed in this Court. One of these cases is *Sosna* v. *Iowa*, discussed above, where the Court addressed the issue *sua sponte* (and ruled that immunity had been waived). Another is *Alabama* v. *Pugh*, 438 U.S. 781 (1978) (per curiam),

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[7] As the Court next stated in *Ford*: "It is conceded by the respondents that if it is within the power of the administrative and executive officers of Indiana to waive the state's immunity, they have done so in this proceeding. The issue thus becomes one of their power under state law to do so." 323 U.S. at 467.

[8] The Ninth Circuit explained in detail the point that the issue of ability to raise immunity at any time was different from the issue of what litigation conduct should be deemed a waiver or forfeiture of immunity in *Hill* v. *Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *amended*, 201 F.3d 1186 (9th Cir. 2000), in an apparent effort to be consistent with the part of *Ford* that allows immunity to be raised at any stage of the proceeding.

where the Court again addressed immunity *sua sponte* and found immunity. Another is *Edelman* v. *Jordan*, 415 U.S. 651 (1974), where the Court cited *Ford* for the proposition that immunity "need not be raised in the trial court," 415 U.S. at 678, and approved the court of appeals' decision to address the issue in those circumstances. Other cases merely recite the principle in *dicta*. See *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 529 (1982) (defense may be raised "for the first time on appeal"; dictum because the Court declined to address the issue; in any event, the State had not yet answered); *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683–84 n.18 (1982) (plurality) (defense "'sufficiently partakes of the nature of a jurisdictional bar' that it may be raised at any point of the proceedings"; dictum because the State raised the issue before the district court very early in the proceedings); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 n.8 (1984) (limitation "deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding"; dictum because the State had raised immunity in its first appeal and the court of appeals had decided it without reported objection of the plaintiffs, see 612 F.2d 84, 109 (3d Cir. 1979)); *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998) (Eleventh Amendment "is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings"; dictum because immunity not at issue in case).

For the reasons given earlier, repudiating the perceived *Ford* rule that immunity may be raised at any stage of a proceeding would show no disrespect to the States, and repudiating that rule is necessarily to avoid conflicts with Article III.

Ford appears to be the product of an era in which State sovereign immunity was viewed as a matter of subject matter jurisdiction that had to be raised by a court *sua sponte* if not raised by a party. That notion never fit well with the long-established rule that sovereign immunity was a defense that

could be waived. In any event, that apparent basis of *Ford* has been undermined by *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515–16 n.19 (1982), and by *Wisconsin Department of Corrections* v. *Schacht*, 524 U.S. at 389, where this Court made clear that immunity does not sufficiently resemble subject matter jurisdiction that a court must address it *sua sponte*. See also *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction.").[9]

The result in *Ford* may reflect the belief that States should have greater latitude in deciding when to assert sovereign immunity when the suit is based upon a State-created cause of action, as was the case in *Ford*. The federal interest is less strong in such cases. Indeed, federal-court jurisdiction in *Ford* was doubtful, because suits based upon State-created causes of action do not generally support federal-question jurisdiction under 28 U.S.C. § 1331, even when the plaintiff's claim for relief depends in part on resolution of a question of federal

[9] Dissenting in *Patsy* with respect to the ruling that immunity need not be addressed by the Court *sua sponte*, Justice Powell, joined by Chief Justice Burger, said: "The reason that the bar of the [Eleventh] Amendment may be raised at any time—as the Court previously has explained—is precisely because it *is* jurisdictional * * *." 457 U.S. at 519, 529 (1982). That view of the Amendment, however, did not carry the day in *Patsy* and has not thereafter.

law.[10] Professor Lapides's case, by contrast, is based in part upon 42 U.S.C. § 1983.

II. A State Should No More Be Entitled To Rest a Defense of Immunity on a Litigating Defendant State Entity's Lack of Authority Under State Law To Waive Immunity Than It Is To Rest That Defense on the State Attorney's Lack of Authority To Waive Immunity.

If the Court agrees that a State or State entity may not litigate on the merits and then rest an immunity defense on the State attorney's lack of authority under State law to waive immunity, it does not follow that the appropriate inquiry is whether the litigating State *entity* is authorized by State law to waive immunity.[11] Instead, the correct federal rule is that, if a

[10] The Court in *Ford* stated that the district court had had jurisdiction because of allegations of violations of the Commerce Clause and the Fourteenth Amendment, 323 U.S. at 460–61, and did not further comment on federal court jurisdiction, even though the federal issues had been dropped by the time the case reached this Court, see Respondents' Supplemental Memorandum in *Ford* at 3–4. Because the suit was held to be against the State, it does not appear that jurisdiction could have been based upon diversity of citizenship, because States are not citizens for purposes of diversity jurisdiction. Jurisdiction under 28 U.S.C. § 1331 would now be doubtful—or even more doubtful than it was at the time—under the teaching of *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986) (violation of a federal statute as an element of state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim under § 1331). The general federal policy is against federal court interference with state tax collection, see 28 U.S.C. § 1341. Accordingly, subject matter jurisdiction rules appear to be adequate to prevent undue federal-court interference with state tax collection, and sovereign immunity rules need not be deformed to achieve that end.

[11] While the authority of the Indiana Department of Treasury to waive immunity is not the focus of the *Ford* decision, *Ford* can be read as finding that the Department, as well as the State Attorney General, lacked authority under State law to waive immunity. *E.g.*, 323 U.S. at 469 ("It would seem,

defendant State entity litigates a federal case on the merits without invoking immunity, then the State entity may not later rest an immunity defense on its own lack of State-law authority to waive immunity, any more than it can rest an immunity defense on its *attorneys'* lack of State-law authority to waive immunity. This rule is similar to the rule of *Schlossberg* v. *Maryland Comptroller of the Treasury* (*In re Creative Goldsmiths of Washington, D.C., Inc.*), 119 F.3d 1140, 1148 (4th Cir. 1997), where the Fourth Circuit, addressing the consequences of a State entity filing a proof of claim in bankruptcy, said:

> "When a state authorizes its officials voluntarily to invoke federal process in a federal forum, the state thereby consents to the federal forum's rules of procedure and may not invoke sovereign immunity to protect itself against the interposition of defenses to its action. The scope of these available defenses and the state's concomitant waiver of immunity is a question of federal law and procedure * * *."

The Court should acknowledge that there is no significant difference between a State entity invoking federal court jurisdiction by intervening in a lawsuit or filing a proof of claim in a bankruptcy proceeding—circumstances in which the Court has not inquired into the authority of the State entity to waive immunity (see *Clark* v. *Barnard*, *Missouri* v. *Fiske*, and *New York* v. *Irving Trust*, and *Gardner*, discussed above)—and the same State entity defending a lawsuit on the merits without raising an immunity defense. As we explained in Part I, the State entity in each such case has voluntarily decided to submit

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therefore, that no properly authorized executive or administrative officer of the sate has waived the state's immunity to suit in the federal courts."). For a more recent case finding that a State executive department lacked authority to waive immunity, see *Magnolia Venture Capital Corp.* v. *Prudential Securities, Inc.*, 151 F.3d 439 (5th Cir. 1998).

the issues to decision on the merits by the federal court, as the Court appeared to recognize in *Richardson* v. *Fajardo Sugar Co.*, 241 U.S. 44 (1916) (discussed above). Absent recognition that waiver may appropriately be found in each such instance without regard to the State entity's State-law authority to waive immunity, federal courts will be subjected to entirely unnecessary proceedings and put in the position of issuing potentially advisory opinions in violation of the fundamental principles of Article III, as we have explained above.

All of the reasons that Justice Kennedy gave in his *Schacht* concurrence for reconsidering the Court's rules in this area and all of the reasons that we have discussed in Part I apply in full to the question of State-entity authority to waive immunity. It is unfair and an unreasonable imposition on federal courts to permit a State entity with a potentially available immunity defense to litigate on the merits without raising immunity, and then, dissatisfied with the way the litigation is going, claim that the entity was not authorized to waive immunity and thereby win dismissal on immunity grounds. Indeed, if the State entity is an "arm of the State" for sovereign immunity purposes, it is essentially because the State has chosen to act in the relevant field through the department, office, board, or other entity in question. And while a "sue and be sued" clause may not suffice, by itself, to waive sovereign immunity to suit in federal court, it surely signals to a potential plaintiff that the entity in question is an appropriate one to take to court. Once the litigation has begun, it shows no disrespect to the State to hold it to its voluntary choice to litigate on the merits.

A State is of course authorized to impose limitations and conditions upon its waivers of sovereign immunity. It may, for example, direct its own courts to apply the rule that only waivers by legislative action are effective, not waivers resulting from the conduct of a State entity (or its attorneys) in litigating the merits of a case. And it may direct its own courts to apply the rule that sovereign immunity may be raised at any time in

the course of litigation, in spite of the State entity's choosing to litigate on the merits without invoking immunity. But federal courts are entitled to apply a rule that, in appropriate circumstances, binds a State or State entity to its voluntary choice to litigate on the merits.

III. Whether the Court Affirms or Reverses the Judgment in this Case, It Should Not Undermine the Rule Suggested by Justice Kennedy's Concurrence in *Schacht* That Litigating on the Merits, Without Raising Immunity, Waives or Forfeits That Immunity.

Here, the State entity simultaneously (1) joined in removing the case to federal court, (2) answered the complaint with a defense, *inter alia*, of Eleventh Amendment or sovereign immunity, and (3) moved to dismiss on the ground of immunity, as well as on other grounds. Thus, while the State entity presented its immunity defense early in the proceeding, the proceeding ended up in federal court solely by virtue of the voluntary action of the State entity.

While we agree with Petitioner that the Regents' conduct amounts to "invoking federal jurisdiction" in such a way that immunity is waived, at least to the extent that their immunity might preclude suit in federal court, we do not elaborate on this argument, because it is addressed in full in the Petitioner's brief.

Whether the Court affirms or reverses the judgment in this case, however, it should do nothing to undermine the rule suggested by Justice Kennedy's concurrence in *Schacht*, that litigating in federal courts on the merits, without promptly asserting a potentially available defense of immunity, waives or forfeits that immunity. That is, as Justice Kennedy suggested, a court should "infer[] waiver from the failure to raise the [Eleventh Amendment] objection at the outset of the proceedings * * *." 524 U.S. at 395. Indeed, this rule is just

another way of applying Justice Kennedy's other suggested rule, that a State entity waives immunity when, "under no compulsion," it "voluntarily invokes [federal court] jurisdiction," such as by removing a case to federal court (as here), intervening, or filing a claim. *Id.* As we have explained above, defending on the merits, instead of moving to dismiss on the grounds of immunity, as occurred in *Richardson* v. *Fajardo Sugar Co.*, invokes federal court jurisdiction in a manner fundamentally identical to intervening on the merits or filing a claim in an ongoing federal court proceeding, as occurred in *Clark* v. *Barnard*, *New York* v. *Irving Trust*, and *Gardner*, discussed above. In each case, the State entity has made a choice to litigate on the merits rather than to stand on its immunity from suit.[12]

Several courts of appeals have articulated rules such as Justice Kennedy's or moved in the direction of such a rule. *E.g.*, *Hill* v. *Blind Industries & Services of Maryland*, 179 F.3d 754 (9th Cir. 1999), *amended*, 201 F.3d 1186 (9th Cir. 2000) (ruling that a State entity could not raise immunity for the first time on the eve of trial); *SDDS, Inc.* v. *South Dakota* (*In re SDDS, Inc.*), 225 F.3d 970, 973 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1733 (2001) (a State may waive immunity "'through its conduct. Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits'") (quoting *Hankins* v. *Finnel*, 964 F.2d 853, 856 (8th Cir. 1992)); *Lawson* v. *Shelby County, Tenn.*, 211 F.3d 331, 334 (6th Cir. 2000) ("Consent may also take the form of a voluntary appearance and defense on the merits in federal court.") (dicta); *Neinast* v. *Texas*, 217 F.3d 275, 279 (5th Cir.

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[12] A different result would obtain when a State entity promptly moves to dismiss on immunity grounds and the district court denies both the motion to dismiss and a stay of proceedings pending the State entity's interlocutory appeal. If such a State entity proceeds to litigate on the merits while its interlocutory appeal is pending, it cannot be said that it is doing so voluntarily.

2000), *cert. denied*, 531 U.S. 1190 (2001) ("the sta
simultaneously proceed past the motion and answer st
merits and hold back an immunity defense") (citing *H*
v. *United States Department of Education* (*In re R*
F.3d 926, 930 n.7 (8th Cir.1999) (citing *Hill* with app
proposition that State entity's active participation in ba
dischargeability proceedings, combined with belated
of immunity, were factors relevant to waiver); *De*
Monteith, 255 F.3d 986, 989 (9th Cir. 2001) (
Amendment "must be raised 'early in the proce
provide 'fair warning' to the plaintiff.") (quoting *Hil*

As we have explained in the preceding parts of this
believe that such a rule shows due respect to th
prevents purely strategic exploitation of federal court
in a manner that is inconsistent with Article III, and
the parties. Such a rule is consistent with the requi
explicit waiver found in *Atascadero State Hospital* v.
473 U.S. 234 (1985), because that requirement was cra
congressional and State statutes in mind and did not
question longstanding prior case law that invoking fed
jurisdiction does waive immunity. It is also consisten
demise of the constructive waiver theory of *Parden* v.
Railway of the Alabama State Docks Department, 377
(1964), see *College Savings Bank* v. *Florida*
Postsecondary Education Expense Board, 527 U.S. 66
because defending a case on the merits, withou
immunity, directly and unmistakably invokes the juris
the federal court, and because thereafter raising im

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[13] We do not represent that the results below are uniform in
See, *e.g.*, *Schlossberg* v. *Maryland Comptroller of the Trea*
Creative Goldsmiths of Wash., D.C., Inc.), 119 F.3d 1140 (4th
(defense on the merits of adversary proceeding in bankruptcy
where State Attorney General was not authorized by State la
immunity and where the lawsuit was unrelated to the State entity
claim in the bankruptcy proceeding, did not waive immunity).

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avoid unsatisfactory results enlists the aid of the federal courts in an effort to negate the judicial proceedings that have gone before in a way that is fundamentally different from mere participation in a commercial activity that is subject to federal regulation. As this Court stated in *Smith* v. *Reeves*, 178 U.S. 436, 440 (1900), "When a State submits itself without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done * * *."

Justice Kennedy's proposed rule should assist the Court in analyzing and deciding this case. If Justice Kennedy's proposed rule requires overruling that part of *Ford* which underlies the perceived rule that an immunity defense may be raised at any stage of a proceeding, that step should be taken. As we have explained above, the notion that sovereign immunity could be raised at any time was premised on such immunity being essentially similar to lack of subject matter jurisdiction. That notion never fit well with the long-accepted rule that sovereign immunity was a defense that the State could "waive at pleasure." *Clark* v. *Barnard*, 108 U.S. at 447. It has been further undermined by the ruling in *Patsy* and *Schacht* that the issue need not be raised by a court *sua sponte*.

There is no occasion in this case to attempt to define at what point litigation becomes "litigation on the merits" so as to waive immunity or at what point a belated assertion of immunity might be justified under circumstances similar to those that at time justify other belatedly-asserted defenses—except to the extent necessary to decide this case. But this case is an appropriate occasion to make clear that sovereign immunity more closely resembles personal jurisdiction than subject-matter jurisdiction and that, accordingly, a State entity lacks the absolute right to dismissal on the basis of immunity if it has litigated on the merits without raising the defense. Justice Kennedy suggested in his concurrence in *Schacht* that the Court could "eliminate the unfairness by modifying our

Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction." 524 U.S. at 395. Although the requirement of personal jurisdiction serves constitutional interests as fundamental as the Eleventh Amendment, lack of personal jurisdiction is a threshold defense that must to be raised at the outset of the litigation or forfeited. Fed. R. Civ. P. 12(h)(1). Whether or not that precise rule is suitable to Eleventh Amendment immunity, federal courts can and should treat immunity as a defense sufficiently similar to personal jurisdiction that it must be asserted before the State entity actively litigates on the merits.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings in accordance with the Court's decision.

Respectfully submitted,

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